MOTION FILED
SEP 25 1981

No. 80-2152

In the Supreme Court of the United States

October Term, 1980

STATE OF MISSOURI, ET AL.,
Petitioners,

vs.

CRATON LIDDELL, ET AL., and EARLINE CALDWELL, ET AL., and JANICE ADAMS, ET AL., and BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, ET AL., and the CITY OF ST. LOUIS, MISSOURI, and the UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION OF NORTH KANSAS CITY, MISSOURI SCHOOL DISTRICT FOR LEAVE TO FILE AMICUS CURIAE BRIEF OUT OF TIME; AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The general questions presented by the petition are most important. NKCSD submits, however, that, because of widespread public interest in mandatory busing and metropolitan cases, additional important questions inhere in this case including:

A. Did the courts below, in an intra-district case, properly apply the test announced in *Milliken v. Bradley*, 418 U.S. 717 (1974) (*Milliken I*) by ordering an inter-district remedy without any evidence of inter-district violations?

B. Can an inter-district remedy be imposed on the Special School District of St. Louis County without a finding that they have been affected by an inter-district violation?

C. In light of *Milliken I* and *Hills v. Gautreaux*, 425 U.S. 284 (1976), can the State of Missouri, which has been shown only to have committed an intra-district violation, be compelled to develop, implement and fund an inter-district desegregation plan?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION OF NORTH KANSAS CITY, MISSOURI SCHOOL DISTRICT FOR LEAVE TO FILE AMICUS CURIAE BRIEF OUT OF TIME

North Kansas City, Missouri School District ("NKC-SD"), pursuant to Sup. Ct. R. 42, requests leave to file the attached *amicus curiae* brief supporting the State of Missouri's Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. Counsel for the State of Missouri has consented to the filing of this brief and will submit a written confirmation to the Court. Counsel for respondents were telephoned in an

effort to obtain their consent, but they were presently unavailable and have not yet returned messages left by counsel for the *amicus*. Accordingly, the *amicus* asks the Court to exercise its discretion to permit the filing of the *amicus* brief along with the other *amicus* briefs already on file which were consented to by respondents.

It is respectfully submitted that the untimeliness of this *amicus* brief was dictated by, and should be considered in light of, the orders entered by the United States District Court for the Eastern District of Missouri on August 24, 1981 and September 21, 1981 (attached as Appendix A). The latter order was brought to the *amicus'* attention the night of September 22, 1981. This brief was drafted and submitted to the printer on September 23, 1981. These extraordinary orders, construing the February 13, 1981, opinion of the Eighth Circuit Court of Appeals, compel development and implementation of an inter-district desegregation plan in a case where the only violation established, and indeed the only evidence presented, was intra-district.[1] The recent orders of the dis-

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1. As contended by the Solicitor General, it was at one time arguable that the Eighth Circuit Court of Appeals, rather than imposing an inter-district remedy, was merely suggesting that one be explored. If this were the case, it may well be that presenting an inter-district issue to the Court was premature. Parenthetically, it can be noted that the Court of Appeals committed a serious error by injecting inter-district remedies into the case no matter what the original intent of the language in its opinion. Nevertheless, as interpreted by the district court, it is apparent that the Court of Appeals was imposing an inter-district remedy on the State of Missouri when it had been found liable only for an intra-district violation. The presence of an inter-district remedy without an inter-district liability hearing is no longer premature. Given the procedural history of this case, it is a foregone conclusion that an inter-district remedy will be ordered. One cannot ignore the reality that whatever future hearings may be held, they will be a sham.

Surely, the August 24, 1981 and September 22, 1981, orders of the district court have persuaded the Solicitor General that

(Continued on following page)

trict court have given life to the Court of Appeals' gratuitous and unjustified suggestion that an inter-district remedy be imposed in this intra-district case. What was once a possibility has recently been made a shocking reality, and the resulting breakdown in fundamental fairness and disregard for established substantive law compels this *amicus* to offer its views.

INTEREST OF THE AMICUS CURIAE

NKCSD is located in Clay County, Missouri, immediately north of the Missouri River. Currently, there are some 17,000 students, all of whom live north of the Missouri River, enrolled in grades K-12 in NKCSD. The tax base of NKCSD is defined by the geographical borders of the district. The affairs of NKCSD are conducted by elected members of a board of education.

The Kansas City metropolitan area includes six counties and numerous municipalities located in both the State of Missouri and the State of Kansas, which is a rapidly growing area of affluent, middle-class residential housing.

NKCSD and the State of Missouri are defendants[2] in a so-called metropolitan desegregation case pending in

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Footnote continued—

the Court of Appeals improperly imposed an inter-district remedy. *Amicus* finds interesting the position of the Justice Department, as evidenced by the September 22, 1981, order of the district court, when contrasted with that of the Solicitor General in his *amicus* brief. Moreover, the residents and pupils attending schools in the nonparty suburban districts would find the "premature" distinction urged by the Solicitor General to be a distinction without meaning. Certainly, the premature concept is illusory to those who had no day in court.

2. Defendants in the Kansas City case include 12 other Missouri suburban school districts from four different Missouri counties (all of the school districts have been historically separate from the Kansas City, Missouri School Districts), the United

(Continued on following page)

the United States District Court for the Western District of Missouri styled *Black, et al. v. State of Missouri, et al.*, No. 77-0420-CV-W-1-3. As aptly stated by United States District Judge John W. Oliver, the original judge assigned to the *Black* case, "In essence, plaintiffs seek to create by federal court order a Greater Kansas City metropolitan school district, with jurisdiction over Missouri and Kansas children in several school districts in each of these states, presumably to be run by this federal court."

The briefs on file do not adequately alert the Court to the fact that the legal principles established in *Milliken v. Bradley*, 418 U.S. 717 (1974) (*Milliken I*) are not being followed by the courts below. The proceedings in the St. Louis case are a *deja vu* of those renounced in *Milliken I*, and are an egregious example of denying the various school districts their fundamental due process rights.

Footnote continued—

States of America and the Departments of Transportation and Housing and Urban Development. The State of Kansas and several Kansas school districts (one of which was already involved in a desegregation case pending in the United States District Court of Kansas) from two different Kansas counties were earlier dismissed for lack of jurisdiction. The other school district defendants in the Kansas City case are aware of this *amicus* brief but time did not permit their joinder. Naturally, all such school districts do not wish to have their due process rights affected by the deprivation of such rights that has occurred in the St. Louis case. These school district defendants believe that regardless of the St. Louis case, no inter-district liability exists in Kansas City and no inter-district remedy could be justified on the facts that will be developed in the Kansas City case. Rather, such a plan would render havoc to public education in the Kansas City area. Massive busing of thousands of students over hundreds of square miles of diverse geographic areas would be required and, at the same time, white flight would dramatically increase to the growing and affluent residential areas of Johnson County, Kansas. Local control of education would be irretrievably lost and public schools on the Missouri side of the state line would ultimately be left with low income minority students whose parents could not afford private schools or a move to the more affluent residential areas in the State of Kansas.

A fair-minded analysis of the proceedings to date leads to the inescapable conclusion that the tragic and disruptive manner in which public education has been dealt with in the St. Louis case has resulted in an injustice to hundreds of thousands of persons. The district court's orders of August 24 and September 21, 1981, relative to construction and implementation of the February 13, 1981, order of the Court of Appeals demonstrate a rare example of judicial proceedings that ignore fundamental due process rights. In this instance, elementary notions of fair play have run aground of and been replaced by proceedings which can only be characterized as abhorent. A more appropriate occasion for this Court's exercise of its supervisory powers over lower federal courts could not be presented.

WHEREFORE, North Kansas City School District moves for leave to file the attached *amicus curiae* brief.

Respectfully submitted,

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DATED: September 24th, 1981.

BRIEF OF NORTH KANSAS CITY, MISSOURI SCHOOL DISTRICT AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

North Kansas City School District ("NKCSD"), as *amicus curiae*, joins the State of Missouri, the petitioner, in praying that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

I. OPINIONS BELOW

The relevant portions of the Court of Appeals' opinion are reproduced in the Appendices to the Petition. The opinion of the Court of Appeals is unreported. Subsequent important orders of August 24, 1981 and September 21, 1981 construing and implementing the Court of Appeals' opinion have been entered by the United States District Court for the Eastern District of Missouri. The former order is reproduced in petitioners' supplemental brief and the latter is reproduced as Exhibit A to this brief.

II. JURISDICTION

The opinion of the Court of Appeals was entered February 13, 1981. A timely petition for rehearing was denied on March 19, 1981. The petition for certiorari was timely filed and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL PROVISION INVOLVED

The applicable constitutional provision is found in the due process clause of the United States Constitution, Amendment V.

IV. STATEMENT OF THE CASE

In the beginning, this case concerned the alleged segregative condition of the St. Louis City School District and whether the State of Missouri or the St. Louis City School Board had committed any acts constituting an intra-district violation which caused that alleged segregative condition. The case was initially tried in that posture, and the only evidence presented was limited to an intra-district violation. On that record, the district court found that no intra-district violation had occurred. Despite this, the Court of Appeals, without any additional evidence and by sleight of hand, reversed the district court and transformed this nine year old case into one involving an inter-district remedy. Upon remand, the district court allowed the proceedings to evolve into an inter-district case being tried in a judicial atmosphere void of any semblance of a fair and deliberative due process procedure. The legitimate rights of heretofore nonparty suburban school districts and the citizens residing in those districts were ignored. It is now a foregone result that inter-district remedies will be ordered no matter what type of hearings are conducted in the future.

As the case is now before the Court, the following facts are clear:

1. The only violations conceivably established and supported by the evidence are intra-district.

2. The St. Louis City School District and the Special School District of St. Louis County have had an inter-district remedy imposed on them.

3. The State of Missouri has been compelled to fund the inter-district remedy imposed on the Special School District of St. Louis County.

4. The State of Missouri has been compelled to develop, implement, and fund an inter-district remedy without the necessary predicate of an inter-district violation.

5. There is currently in effect an inter-district desegregation plan involving the City of St. Louis and five counties who are supposedly participating "voluntarily." This plan is being funded by the State of Missouri.

V. REASONS FOR GRANTING THE WRIT

A. The Decision and Proceedings Below Raise Significant and Recurring Problems Concerning the Proper Application of the Strict Test Articulated in *Milliken v. Bradley* That Must Be Met Prior to the Ordering of Inter-District Remedies.

The petition presents this Court with the case where, despite *Milliken's* strict inter-district tests, an inter-district remedy was ordered in a solely intra-district case. The result of having all but ignored *Milliken* is that substantial ongoing problems of nationwide impact in the conduct of alleged metropolitan cases have been created. Unless other lower courts are more attuned to the legitimate rights of all parties in alleged metropolitan cases, the result of the St. Louis case could create the preconceived notion that mere racial imbalance mandates metropolitan relief without regard to intentional inter-district segregative acts. Indeed, residential patterns other than a result of segregative intent, are explainable on the grounds of economics, social class, personal preferences of blacks and whites and other non-governmental actions. However, the posture of the St. Louis case makes it extremely doubtful whether such underlying facts, even if time was granted to develop

them, would be considered. Certainly, a metropolitan plan is such an extraordinary and drastic remedy that it should be carefully and thoroughly examined prior to implementation and must be limited to the extent of any violation. At the least, a wide-ranging metropolitan plan ought not to be implemented on the perfunctory basis ordered in St. Louis.[1]

The holdings by the Court of Appeals and the district court result in it being well nigh impossible for the St. Louis suburban schools to defend against imposition of a metropolitan remedy. The need to resolve the problems created by such a "cart before the horse" decision is heightened by the discarded rights of those thousands of students attending the suburban schools. The rights of those students are worthy of having the elementary protection of a non-biased hearing.

The serious implications flowing from the inherently unfair practice of ordering inter-district remedies in contravention of *Milliken's* requirement of a prior establishment of significant and intentional inter-district violations require this Court's attention. Also, there is a conflict in the Eighth Circuit's application of *Milliken* when contrasted to *Armour v. Nix,* No. 16708 (N.D. Ga.), *aff'd,* 446 U.S. 931 (1980) (no metropolitan remedy in Atlanta); *Lee v. Lee County,* 639 F.2d 1243 (5th Cir. 1981) (no

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1. The exceptionally important questions posed by the State of Missouri's Petition must be considered against the backdrop of the legal theories used by those self-appointed social architects who have filed alleged metropolitan cases in St. Louis, Kansas City and other areas throughout the country. Those theories are obviously calculated to create an end-run on *Milliken* and to require a metropolitan racial-balance test without regard to intentional acts of segregation by suburban school districts. Throughout the country, advocates of metropolitan plans are seeking ways to expand *Milliken's* purposefully narrow channel for metropolitan plans by rendering illusory the opportunity of suburban school districts to defend themselves.

metropolitan plan is proper for segregation caused without intent to illegally segregate); *Taylor v. Ouachita Parish*, 648 F.2d 958 (5th Cir. 1981) (no metropolitan remedy permissible even though nonintentional acts of government may have contributed to segregated conditions); *Ross v. Houston Independent School District*, No. 10,444 (S.D. Texas 1981) (denial of an attempt to transform the *Houston* case into a metropolitan case by belated efforts to add suburban school districts at the remedy stage of an intra-district case). The Court of Appeals' gratuitous order, construed by the district court to require implementation of an inter-district remedy in this intra-district case, stands in stark conflict with such decisions, thereby requiring this Court's attention.

There is a wealth of recent social science research studies demonstrating that disruptive busing and complex metropolitan plans heretofore judicially mandated were based on wholly inaccurate, highly misleading and overly optimistic social science theories. The reality is that a child, be it black or white, receives a quality education only through local control and parental involvement. Metropolitan plans do not work except to create a lower social and economic orientation in all public schools, and there is no overwhelming support for anything other than strong neighborhood schools among both black and white parents so long as equal opportunity is present. No one wishes to retreat to separate but equal schools or to prevent equal opportunity for all citizens but now is the time for a common sense restatement of the *Milliken* principle so that ill-conceived metropolitan plans can be terminated unless specific, intentional and present segregative purposes and effects are actually shown.[2]

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2. Undoubtedly, part of the problem in this case is caused by the appointment of Mr. Gary Orfield as an expert for the

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B. The Inter-District Remedy Imposed on the Special School District of St. Louis County Without a Finding That They Have Been Affected by an Inter-District Violation Is Improper.

Before an inter-district remedy may be imposed "it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district." *Milliken I* at 744-45. At best, plaintiffs have established only a violation within the St. Louis City School District. To find a violation broader in scope would be inconsistent with the intra-district theory upon which the case was filed and tried. Plaintiffs presented no evidence on the issue and failed to show that the alleged violation had an effect in the Special District of St. Louis County, or that there was a constitutional violation in the Special District which had an effect in the St. Louis City School District. Any contrary finding is clearly erroneous. To the extent the district court imposed a desegregation plan on the Special District, it exceeded its equitable powers because the remedy is not commensurate with the nature and extent of the only proven violation, and indeed the only violation on which proof was presented. *Id.* at 744.

Footnote continued—

Court. Mr. Orfield is a well-known advocate of metropolitan plans. Yet, recent books and social science studies cast much doubt on claims of residential or school population stability in metropolitan cases. See Wolf, Trial and Error—The Detroit School Segregation Case (1981), for an excellent discussion of the failure of social scientists to present fair and adequate social science opinions and evidence to the courts in the area of desegregation. This engrossing and detailed work by a respected social scientist is a devastating analytical statement against the expansive forced busing required by metropolitan plans. The utility in such plans is difficult to perceive.

C. In Light of *Milliken I* and *Hills v. Gautreaux*, 425 U.S. 284 (1976), the State of Missouri, Which Has Only Been Shown to Have Committed an Intra-District Violation, Cannot Be Compelled to Develop, Implement and Fund an Inter-District Desegregation Plan.

Milliken I makes clear that an inter-district remedy may be imposed upon a school district only if (1) a violation occurring in that district or a violation having a significant segregative effect in that district is established, and (2) that school district is given an opportunity to receive a meaningful hearing before it is made part of an inter-district remedy. In the present case, five school districts are "voluntarily" participating in an inter-district desegregation plan developed and funded by the State of Missouri. If an inter-district remedy is not imposed upon a school district, they are not within the question addressed in *Milliken I*. Although this order ostensibly operates only on a constitutional wrongdoer, the State, the more important question is whether the remedy of an inter-district plan is tailored to the proven violation. Of course, the State quite properly does not concede that it is a wrongdoer. By definition, the proffered remedy far exceeds the violation proven.

If, as held in *Milliken*, local control of education is an important and valued right in our country, the St. Louis suburban school districts cannot be summarily cast aside simply by a finding against the State. Certainly, the intent of *Milliken* to prevent remedies against non-violating local school districts should have prevented the Court of Appeals and the district court from acting as they did here. A proper remedy if a State violation is found could well be limited to the advancement of funds

alone[3] and not uncalled for inter-district remedies against innocent nonparty suburban districts.

Finally, it is improper for the district court to require submission of an inter-district desegregation plan before there is any finding of an inter-district violation. First, such an order is contrary to the spirit and holding of *Milliken*. Second, it is impossible for the State to develop intelligently such a plan. There is no way to know who any violators are or the incremental effects of any violations. In formulating a plan, prior to finding an inter-district violation, the State would be groping in the dark. Third, such an order casts a poor light on the impartiality of the district court. Requiring time and money to be spent on an inter-district plan suggests that the court is predisposed to implementing it. In order not to waste the effort involved in formulating an inter-district plan, the court must first have to find an inter-district violation. It is unreasonable to require a plan for which no use has been estabilshed unless the court cares not about the due process rights to a fair hearing for those nonparties who are affected by such a plan.

VI. CONCLUSION

A summary reversal of the Court of Appeals' February 13, 1981, opinion should be entered with directions given to the Court of Appeals to strike all premature references it made to any inter-district remedy and to remand the case to a newly appointed district judge for

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3. It should be pointed out that dictating the use of State funds and in what amounts could present additional problems. See Note, Local Taxes, Federal Courts and School Desegregation in the Proposition 13 Era, 78 Mich. L. Rev. 587 (1980). Moreover, the State of Missouri presently has a serious cash problem which has required budget cutbacks in nearly all state agencies, and no raises to state employees including the faculty at the University of Missouri.

whatever further evidence the State of Missouri wishes to adduce on the issue of intra-district liability. All matters relating to any inter-district issues should be stricken from this case so that public confidence in fair and orderly procedures can be maintained.

Respectfully submitted,

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Dated: September 24th, 1981

APPENDIX

APPENDIX A

(Filed September 21, 1981)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 72-100C(4)

CRATON LIDDELL, et al.,
Plaintiffs,

v.

THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, STATE OF MISSOURI, et al.,
Defendants.

ORDER

A memorandum dated this day is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED that the motion of the United States to modify Order H(337)81 be and the same is granted in part and denied in part as set forth in the incorporated memorandum.

Dated this 21st day of September, 1981.

/s/ William Hungate
United States District Judge

(Filed September 21, 1981)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION
No. 72-100C(4)

CRATON LIDDELL, et al.,
Plaintiffs,

v.

THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, STATE OF MISSOURI, et al.,
Defendants.

MEMORANDUM

This matter is before the Court on H(360)81, the motion of the United States to modify Order H(337)81. For the reasons stated below, the motion to modify will be granted in part and denied in part.

On August 24, 1981, this Court entered its Order H(337)81, which, inter alia, provides that

> IT IS HEREBY FURTHER ORDERED that in accordance with Judge Meredith's order dated May 21, 1980, as amended, that the State defendants, the United States, and the St. Louis Board of Education are ordered and directed as follows:
>
> > To develop and submit to the Court by February 1, 1982, a suggested plan of interdistrict school desegregation necessary to eradicate the remaining vestiges of government imposed school segregation in the City of St. Louis and St. Louis County.

The United States now moves the Court to modify Order H(337)81 by striking the above-quoted portion or, in the alternative, by modifying the language to delete references to the United States, consistent wtih the following provisions of Judge Meredith's September 17, 1980, order.

> It appears to the Court that it is highly important that the efforts of the United States, the State, and the St. Louis Board of Education, heretofore developed with the cooperation of county school districts should be continued and intensified. This and other considerations indicate the advisability of changing timetables and certain aspects of the parties' participation in some of the programs which are the subject of subparagraphs (a) through (d) of paragraph 12.
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> • • •
>
> 3. Paragraph 12(c) is hereby amended as to the following provisions: On or before February 16, 1981 the State defendants and the St. Louis Board of Education shall prepare and submit to the Court a feasibility plan of interdistrict school desegregation involving the St. Louis school district and such suburban school districts, that will provide complete and lasting school desegregation. These considerations may apply to those suburban school districts which are not necessarily confined to the suburban districts located in St. Louis County but limited only by considerations of feasibility and practicality, including reasonableness of transportation times and distances. This feasibility plan should include educational and ancillary components such as those outlined in the Court of Appeals' opinion of March 3, 1980 in this case, and should specifically include pupil assignment and administrative reorganization provisions.

On March 19, 1981, the United States Court of Appeals for the Eighth Circuit affirmed not only the provisions of paragraph 12(c) in Judge Meredith's September 17, 1980, Order, but also expressly declined to change its February 13, 1981, mandate that affirmed paragraph 12(c) as originally written.

After reviewing Judge Meredith's original and amended orders, the Court of Appeals held that

> The State's motion does not persuade us to stay our February 13, 1981, mandate. Moreover, we are satisfied that *the provisions of paragraph 12, both as originally written and as amended, must be enforced.* . . . In our February 13, 1981 opinion, we stressed that the State of Missouri, who has been judicially determined to be a primary constitutional violator, may properly be ordered to take steps within its power to remedy those violations (citation omitted). Paragraphs 12(a) - (c) of the district court's order are salutory remedial directives and are entirely enforceable against the State in the present procedural posture of this lengthy and complicated litigation.
>
> The State of Missouri's motion [to stay the Court of Appeals' mandate dated February 13, 1981, or to stay enforcement of the district court's orders] is denied. We order prompt implementation of our mandate in *Liddell v. Board of Educ.*, Nos. 80-1458, 80-1494, 80-1531, 80-1599 & 80-1735 (8th Cir., Feb. 13, 1981). (emphasis added).

Liddell v. Board of Educ., No. 80-1458, slip op. at 17 (8th Cir., Mar. 19, 1981).

In light of the Court of Appeals' adherence to its February 13, 1981, pronouncement concerning the legal responsibilities of the State of Missouri for the prompt de-

segregation of the St. Louis public school system, *id.* at 12, the request of the United States for deletion of the above-quoted portions of Order H (337) 81 will be denied.

In the alternative, the United States requests that the Court eliminate the United States from the reporting provisions of Order H(337)81.

Plaintiffs-intervenors Adams object to relieving the United States of any responsibilities under paragraph 12(c) as set forth in Judge Meredith's May 21, 1980, Order. Because the United States did not seek appellate review of the paragraph 12(c) reporting requirements, Adams asserts that this Court should not permit the United States now to avoid carrying out its obligations.

The State defendants support the United States' motion to terminate any reporting under paragraph 12(c) of the May 21, 1980, Order pending a trial on the merits of the recently filed amended complaint and cross-claim against the county school districts.

On February 13, 1981, the Court of Appeals took judicial notice that the City Board and Caldwell had filed amended complaints asking the district court to require interdistrict integration with the schools of St. Louis, St. Charles, and Jefferson Counties. Without expressing an opinion as to the merits of the proposed amendments, the Court of Appeals emphasized that

> the pendency of these petitions must not be permitted to delay the full and complete implementation of every feature of the [desegregation] plan developed by the district court and approved by this Court including those sections of the plan that relate to inter-district integration [paragraphs 12(a)-(c)].

Liddell v. Board of Educ., No. 80-1458, slip op. at 10 (8th Cir., Feb. 13, 1981).

The Court cannot terminate the reporting provisions of paragraph 12(c) without disobeying the foregoing mandate of the United States Court of Appeals for the Eighth Circuit.

Notwithstanding the appellate court mandate, the State defendants argue that it is improper to order the preparation of a mandatory interdistrict remedy until such time as a constitutional violation has been found which in fact has an interdistrict effect. *See Swann v. Charlotte Mecklenberg Board of Educ.*, 402 U.S. 1 (1971) (emphasizing that the scope of the remedy is determined by the nature of the constitutional violation).

The Court of Appeals explicitly found that paragraph 12(c) of Judge Meredith's May 21, 1980, Order is within the authority of the district court to remedy segregation imposed by the State or other defendants. *Id.* at 19-20. The record is replete with evidence of discriminatory action and inaction by the State of Missouri. *See, e.g., Adams v. United States*, No. 79-1468, slip. op. at 7-8 (8th Cir., Mar. 3, 1980), setting forth the following historical background of this case:

> Prior to the Civil War, a Missouri statute provided: "No person shall keep or teach any school for the instruction of negroes or mulattoes, in reading or writing, in this State." Act of February 16, 1847, § 1, 1847 Mo. Laws 103. Beginning in 1865, the Missouri General Assembly enacted a series of statutes requiring separate public schools for blacks. *See, e.g.*, Act of February 17, 1865, § 13, 1865 Mo. Laws 226. This segregated system was incorporated into the Missouri Constitution of 1945, which specifically provided that separate schools were to be maintained for "white and colored children." *See* Mo. Const. art. IX, § 1(a) (1945). Although a 1954 Attorney General opinion declared this provision unenforceable following

> *Brown I*, it remained a part of the state constitution until repealed in 1976. Statutes implementing the constitutionally mandated segregation provided for separate funding, separate enumerations, separate consolidated "colored" school districts, and the interdistrict transfer of black students. Most of these statutes were not repealed until 1957. *See* Act of July 6, 1957, § 1, 1957 Mo. Laws 452.

See also Liddell v. Board of Educ., 491 F.Supp. 351, 359-60 (E.D. Mo. 1980).

In light of the Court's finding of unconstitutional segregation imposed by the state government and other defendants, the Court of Appeals stressed the legal obligation of the United States, the State of Missouri, and Board of Education to develop and implement the plans contemplated by paragraph 12 of Judge Meredith's May 21, 1980, Order. *Liddell v. Board of Educ.*, No. 80-1458, slip op. at 20, n.6 (8th Cir., Feb. 13, 1981) (mandating that "the district court countenance no excuse for further delay" in implementing the paragraph 12 plans).

The United States advises that it is always available to assist the Court upon request. The record indicates that since the United States intervened in this case in 1977, the federal government has consistently pursued a policy of assisting the State and local governments to devise plans to provide complete and lasting desegregation in the St. Louis public schools.

In contrast to its previous efforts to devise a desegregation remedy in cooperation with the city and county districts, the United States currently is not seeking a 12(c) interdistrict remedy. As a plaintiff-intervenor, the United States maintains that the obligation to develop a plan pursuant to paragraph 12(c) of Judge Meredith's orders is on the defendant State of Missouri and defendant Board of Education of the City of St. Louis.

Although the Court of Appeals stressed the obligation of the United States to comply with paragraph 12(c) of Judge Meredith's May 21, 1980, Order, the appeals court noted that no party had named the United States as a defendant and alleged that it engaged in discriminatory practices. *Id.* at 26.

Unless compelled to grant affirmative relief against the United States, the Court believes that the executive branch has a right to change its school desegregation policies. Therefore, the request of the United States to be relieved of its reporting responsibilities under Order H(337) 81 will be granted.

The City Board supports the portion of the motion of the United States to modify Order H(337)81 to reflect the changes made in paragraph 12(c) by Judge Meredith's Order dated September 17, 1980, *supra.*

The original version of paragraph 12(c) required the development of a plan to correct "the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County." The City Board agrees with the government's assertion that the original version imposes an awkard limitation on the 12(c) planning process and submits that the problem was corrected in the amended version of paragraph 12(c), which required the development of a plan that would be "limited only by considerations of feasibility and practicality."

Adams rejects the position of the City Board as an attempt to interpose spurious delays in carrying out the original version of paragraph 12(c), which ordered that an interdistrict desegregation plan be presented to the Court sixteen months ago. Because the liability of the City Board and State has been determined by Judge Meredith and affirmed by the Court of Appeals, Adams contends that there is no legitimate reason to permit further delay in

addressing the scope of the remedy necessary to alleviate the remaining vestiges of government-imposed school segregation.

The City Board prefers to expand the original version of paragraph 12(c), which was limited to the City of St. Louis and St. Louis County, to include suburban school districts beyond St. Louis County. The Court has stayed its ruling until an evidentiary hearing may be held on expanding this litigation to include school districts in St. Charles and Jefferson Counties. The Court has also stayed discovery and claims against the school districts in St. Louis County that are voluntarily participating in a cooperative plan to achieve complete and lasting desegregation.

Having carefully considered paragraph 12(c) of Judge Meredith's Order dated May 21, 1980, as amended by his order dated September 17, 1980; the mandates of the United States Court of Appeals for the Eighth Circuit; the arguments of counsel; and the record as a whole, Order H (337) 81 will be amended to read as follows:

IT IS HEREBY FURTHER ORDERED that in accordance with Judge Meredith's Order dated May 21, 1980, as amended and as affirmed by the United States Court of Appeals, that the State defendants and the Board of Education of the City of St. Louis are ordered and directed as follows:

> To develop and submit to the Court by February 1, 1982, a suggested plan for interdistrict school desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County.

Dated this 21st day of September, 1981.

/s/ William Hungate
United States District Judge